

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

| | | |
|----------------------------------|---|----------------------|
| DEIDRA BARNES |) | |
| Claimant |) | |
| V. |) | |
| |) | Docket No. 1,074,782 |
| STATE OF KANSAS |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| STATE SELF-INSURANCE FUND |) | |
| Insurance Carrier |) | |

ORDER

Respondent requests review of the November 18, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders.

APPEARANCES

Jeffrey K. Cooper, of Topeka, Kansas, appeared for the claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from November 18, 2015, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant suffered injury to her left upper extremity arising out of and in the course of her employment with respondent. Claimant's date of accident was found to be July 31, 2015. Based upon a Notice of Hearing filed on August 13, 2015, and a claim letter sent to respondent dated August 12, 2015, the ALJ determined claimant provided respondent with timely notice of her left wrist injury. Respondent was ordered to provide treatment for claimant's left wrist.

The respondent requests review of the Order, arguing claimant's left wrist injury did not arise out of and in the course of her employment and claimant did not provide timely notice of injury.

Claimant argues the ALJ's Order should be affirmed.

The issues on appeal are:

1. Did claimant suffer personal injury by repetitive trauma arising out of and in the course of her employment with respondent?
2. Was claimant's work for respondent the prevailing factor causing the injury and medical condition for her left upper extremity?
3. Did claimant provide timely notice of her alleged accident?

FINDINGS OF FACT

Claimant originally worked for Geary County as a legal secretary for 13 years. While there, claimant developed problems in her right hand as the result of repetitive motions with her job. Claimant ultimately received medical treatment, beginning with conservative treatment and later progressing to surgery on her right upper extremity for her diagnosed condition of de Quervain's tenosynovitis. That litigated matter was assigned Docket No. 1,071,180. Claimant changed employment on September 24, 2013, transferring to the Board of Indigent Defense, and later to the Department of Children and Families, both with the State of Kansas. Claimant's surgery on her right upper extremity was performed by Dr. Chase in Manhattan, Kansas on February 6, 2014. While recovering from the right upper extremity surgery, claimant returned to work with the State, limited to one handed work only. This limitation caused claimant to use her left upper extremity extensively, resulting in the development of pain in her left wrist around April 2014. Claimant described these problems as the same kind she experienced in her right upper extremity.

Claimant was referred, by her attorney, to board certified orthopedic surgeon Lynn D. Ketchum, M.D., on November 12, 2014. Dr. Ketchum noted claimant had bilateral wrist problems, right worse than left. Dr. Ketchum identified traction neuritis in claimant's right distal forearm which he described as "where a nerve is entrapped in scar tissue".¹ The left distal forearm was identified as having pain when typing. No specific diagnosis was made for claimant's left upper extremity.

Claimant returned to Dr. Ketchum on January 15, 2015, again at the instruction of her attorney. During that examination, the doctor identified claimant's forearms and wrists

¹ P.H. Trans., Resp. Ex. A at 6 (Dr. Ketchum's Nov. 12, 2014, report).

as being irritated from typing. He noted claimant's ergonomic keyboard broke on January 8, 2015. She was given a standard keyboard to use, but that irritated both of her forearms and wrists on the dorsoradial side, so claimant did no typing until a new keyboard was obtained. He explained, "Typing is the thing that really irritates her."² Claimant's left wrist was diagnosed as "simply a deQuervain's stenosing tenosynovitis."³

Claimant was referred by the ALJ for an independent medical examination (IME) with board certified orthopedic surgeon, J. Clinton Walker, M.D., on July 22, 2015. The history provided Dr. Walker was the same as claimant gave to Dr. Ketchum. Claimant was diagnosed with bilateral de Quervain's tenosynovitis and post right 1st dorsal extensor compartment release. Claimant was found to be at maximum medical improvement for her right upper extremity, but in need of ongoing treatment for her left wrist.

The doctor opined claimant's work activities were likely the prevailing cause of claimant's left wrist de Quervain's tenosynovitis symptoms which occurred while claimant worked for the State of Kansas. Dr. Walker stated claimant's left upper extremity symptoms were not related to her prior employment with Geary County.

Claimant requested medical treatment for her left upper extremity in Docket No. 1,071,180 and compensation was denied by one Board Member after it was determined claimant's left upper extremity problems stemmed from her subsequent employment with the State of Kansas. Said decision was based on Dr. Walker's report, the only evidence at the time.

Claimant testified the information from Dr. Walker was the first time she had been advised her left hand problems were related to her work for the State, and no other doctor had told her that before. Claimant's left hand symptoms have continued to worsen as she continued to work. Claimant testified that typing caused her the most problems. Claimant acknowledged the State of Kansas jobs were less intense than the prior job with Geary County.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

² *Id.* at 2 (Dr. Ketchum's Jan. 12, 2015, report).

³ *Id.*

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(e) states:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2014 Supp. 44-508(f)(1)(2)(A) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

- (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
- (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
- (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2014 Supp. 44-520(a)(1) states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

Respondent contends claimant's left upper extremity repetitive trauma occurred as the result of her former employment with Geary County. An earlier opinion by a single Board Member in a companion case determined claimant's left upper extremity problems occurred while claimant was working for the State and not Geary County. This record supports that finding. Claimant developed problems while working for the State. The left upper extremity symptoms did not develop until claimant had been working for the State for several months. Both claimant and her examining physicians identified the typing while working for the State as the irritating activity with her left wrist symptoms.

It is acknowledged claimant was overcompensating for the limitations in her right wrist subsequent to the surgery performed to correct the problems created by her job with Geary County. However, even after claimant was allowed to remove the splint on her right wrist, her left wrist continued to worsen as she continued to work for the State. This Board Member finds claimant suffered injury by repetitive trauma to her left upper extremity while working for the State of Kansas and this employment was the prevailing factor leading to her need for medical treatment to the left upper extremity.

The next issue deals with the date of injury by repetitive trauma suffered by claimant while working for respondent. The ALJ determined claimant's date of injury was July 31, 2015, the date claimant's attorney received the medical report from Dr. Walker identifying claimant's job duties of typing as the cause of her left upper extremity injuries. Thus, any information provided respondent within 20 days of that date would be timely notice.

However, the ALJ failed to consider the information provided to claimant by Dr. Ketchum when he examined claimant on January 15, 2015. That information, by way of a January 15, 2015, letter was also provided to claimant's attorney. In that letter, Dr. Ketchum identified typing as the aggravating activity leading to claimant's left upper extremity symptoms. The doctor also provided restrictions to claimant's work with respondent in that letter. While Dr. Ketchum does not specifically name respondent, he identifies the typing claimant was doing at the time of his examination as the cause of her de Quervain's stenosing tenosynovitis in her left upper extremity.

Under K.S.A. 2014 Supp. 44-508(e) claimant's date of accident is January 15, 2015. Claimant's notice to respondent did not occur until August 2015, well beyond the time limits set forth in K.S.A. 2014 Supp. 44-520(a)(1). The many revisions to the Kansas Workers Compensation Act (Act) have created significant traps for unwary claimants not well versed in workers compensation litigation. This date-of-accident/notice scenario is a good example of just such a trap. The award of benefits by the ALJ is reversed as claimant failed to provide timely notice of her injuries by repetitive trauma while working for respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be modified to find claimant's date of injury by repetitive trauma is January 15, 2015. Thus, the award of benefits must be reversed as claimant failed to provide timely notice of her work-related injuries to her left upper extremity.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated November 18, 2015, is reversed and claimant is denied benefits due to a lack of timely notice.

⁴ K.S.A. 2014 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Jeffrey K. Cooper, Attorney for Claimant
jeff@jkcooperlaw.com
toni@jkcooperlaw.com

Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
nate@burghartlaw.com
stacey@burghartlaw.com

Rebecca Sanders, Administrative Law Judge